

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

NOE CORRAL,

Defendant and Appellant.

B162894

(Los Angeles County  
Super. Ct. Nos. TA064655 and  
YA046259)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Arthur M. Lew, Judge. Affirmed.

William M. Duncan, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephen A. McEwen and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Noe Corral was on formal probation (case No. YA046259) when a jury convicted him of a new drug-related offense (case No. TA064655). The trial court found him in violation of probation. Corral was sentenced to state prison for a total term of five years, which encompassed both his latest conviction and his probation violation. On appeal, he contends the trial court: (1) improperly denied his request for a continuance and deprived him of his right to discharge retained counsel prior to trial, and (2) wrongly deprived him of the benefits of Proposition 36 in violation of his constitutional right to equal protection.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **1. Trial Evidence**

Corral does not challenge the sufficiency of the evidence. His contentions are limited to claims the trial court erred by refusing to grant a continuance and to allow him to discharge retained counsel before trial, and by denying him Proposition 36 treatment. Accordingly, we summarize the facts underlying the instant case (No. TA064655).

On the evening of April 16, 2002, officers on routine patrol encountered four men drinking beer, one of whom was Corral. As the officers emerged from their patrol car, Corral fled. The officers gave chase. Corral discarded an object while he ran. One officer recovered the object, a plastic hide-a-key case containing 3.63 grams of cocaine base. Corral was apprehended and officers found \$299 in cash and a pager on his person. Corral did not present evidence in his defense.

### **2. Procedural History**

In May 2001, Corral pleaded guilty to possession of cocaine base for sale and possession of methamphetamine in case No. YA046259. (Health & Saf. Code, §§ 11351.5, 11377, subd. (a).) He was granted three years of formal probation on condition he serve one year in jail.

On June 18, 2002, Corral was newly charged by information with possession of cocaine base for sale in case No. TA064655. (Health & Saf. Code, § 11351.5.) It was

also alleged that he had suffered three prior felony convictions within the meaning of the “Three Strikes” law. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

On July 16, 2002, an amended information was filed in case No. TA064655, which deleted two of the prior “strike” conviction allegations and added an allegation that Corral had suffered one prior controlled substance conviction. (Health & Saf. Code, § 11370.2, subd. (a).) Corral pleaded not guilty and denied the enhancement allegations. On July 16, 2002, a petition was filed alleging he had violated his probation in case No. YA046259 based on the offense charged in case No. TA064655. The probation violation hearing was to be held concurrently with the jury trial.

On September 6, 2002, a jury convicted Corral in case No. TA064655 of the lesser included offense of possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and the court found Corral committed a probation violation and revoked his probation in case No. YA046259.

On September 12, 2002, Corral was sentenced on both matters. In case No. TA064655, the court dismissed the remaining prior strike conviction allegation on the prosecutor’s motion, denied Corral probation, and sentenced him to a two-year state prison term. In case No. YA046259, the court declined to reinstate probation and sentenced Corral to state prison for a term of five years for possession of cocaine base for sale and a concurrent term of two years for possession of methamphetamine. This sentence was to be served concurrently to the sentence imposed in case No. TA064655.

## **DISCUSSION**

### **1. Corral’s request for a continuance.**

#### **a. Relevant procedural facts.**

On June 18, 2002, when Corral was arraigned on the new information, the trial court set a “motion cutoff date” of July 18, 2002, and a trial date of August 19, 2002 (the 60th day). Defense counsel informed the prosecutor that the three prior strike convictions were alleged in error. On July 16, 2002, an amended information was filed, omitting two of the prior strike convictions. Defense counsel represented that Corral had no prior

strike convictions. The trial court agreed to continue the trial and probation violation hearing to no later than September 3, 2002, and ordered the court file in case No. VA022196, to determine whether Corral's conviction in that case qualified as a prior strike conviction. Defense counsel indicated the resolution of that issue "might possibly" lead to a disposition.

At the pretrial conference on August 5, 2002, the court granted defense counsel's request to continue the pretrial conference because the file in case No. VA022196 had not been received. The court file was still missing at the August 22, 2002 pretrial conference. Defense counsel requested a further continuance to move for discovery of information under Evidence Code sections 1043 and 1045 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). The prosecutor was ordered to look into informally providing *Pitchess* information to the defense. The pretrial conference was continued to August 27, 2002.

On August 27, 2002, the matter was again continued to August 29, 2002, this time for a hearing on a defense motion to continue the trial under Penal Code section 1050.<sup>1</sup> On August 29, 2002, the court informed counsel that the court file showed Corral's conviction in case No. VA022196 was not a prior strike conviction as alleged in the amended information. The prosecutor informed the court that, as she had previously told defense counsel, her offer of a six-year state prison term would remain unchanged.

Defense counsel then argued to continue the trial so he could file a *Pitchess* motion. While acknowledging it may have been "better practice" to bring the *Pitchess* motion earlier, defense counsel explained he delayed filing the motion in anticipation of reaching a disposition when the remaining strike conviction allegation was dismissed. However, when the prosecutor told him on August 22, 2002, that the dismissal would not affect her six-year offer, defense counsel asked her to produce *Pitchess* information

---

<sup>1</sup> The written continuance motion was apparently filed either August 27 or 29, 2002, and is not included in the record.

informally. On August 27, 2002, the prosecutor advised him she could not comply with his request. She also refused to agree to a continuance so defense counsel could file a *Pitchess* motion.

The trial court denied the continuance motion, finding the defense had failed to establish good cause under rule 6.4 of the Local Rules of the Superior Court of Los Angeles County.<sup>2</sup> The court told defense counsel “the fact that you chose, per your own tactics, to delay making that decision until today, to [*sic*] which is virtually two days before trial, [the] court finds that [*sic*] that’s not sufficient grounds to allow a *Pitchess* motion after the cutoff date was set.”

On August 30, 2002, defense counsel filed a motion to continue the trial so he could pursue a petition for writ of mandate/prohibition contesting the court’s denial of his previous continuance motion. After the motion was argued on September 3, 2002, the morning of trial, the court stated it had already ruled that defense had not established good cause for a continuance under rule 6.4, and would therefore deny the motion absent additional justification for the writ petition. In response, defense counsel notified the court that Corral intended to discharge him as counsel of record and wanted the court to appoint him new counsel. The court immediately held an in camera hearing. Defense counsel’s motion to continue was ultimately denied.

---

<sup>2</sup> Rule 6.4 provides in pertinent part: [¶] (a) Conduct of Arraignment. At the arraignment, unless otherwise ordered for good cause: [¶] (1) The court shall set dates for: [¶] a) Trial and arrival of preplea report, if necessary; [¶] b) Pretrial conference; and [¶] c) Hearing on all pretrial motions, specifying the dates for filing and service of motions and responses. [¶] (2) Counsel shall abide by all dates set. No continuance will be granted except upon a showing of good cause pursuant to Penal Code section 1050.

**b. The trial court did not abuse its discretion by denying the requested continuance.**

Corral asserts the trial court erred by denying his counsel's request for a continuance to seek discovery under *Pitchess*, and thereby deprived him of due process, effective assistance of counsel, and a fair trial.<sup>3</sup> His contention is without merit.

Continuances in a criminal case may be granted only upon a showing of good cause. (Pen. Code, § 1050, subd. (e); *People v. Frye* (1998) 18 Cal.4th 894, 1012.) The trial court "has broad discretion to grant or deny the request." (*People v. Frye, supra*, 18 Cal.4th at pp. 1012-1013; *People v. Jenkins* (2000) 22 Cal.4th 900, 1037.) "In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request. [Citations.]" (*People v. Frye, supra*, at p. 1013; see also *People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.) The trial court's decision is reviewed for clear abuse of discretion. (*People v. Jenkins, supra*, 22 Cal.4th 900, 1037; *People v. Samayoa* (1997) 15 Cal.4th 795, 840.) Appellate challenges to a trial court's denial of a continuance motion are seldom successfully attacked. (*People v. Beeler* (1995) 9 Cal.4th 953, 1003.)

An important factor for the trial court to consider is whether a continuance would be useful. (*People v. Beeler, supra*, 9 Cal.4th at p. 1003.) The court considers "not only the benefit which the moving party anticipates but also the likelihood that such benefit will result . . . ." (*People v. Jenkins, supra*, at p. 1037.) It is proper to grant a continuance to permit a defendant to investigate exculpatory evidence. (*People v. Gatlin* (1989) 209 Cal.App.3d 31, 40-41.) Conversely, the speculative nature of what is to be gained by a continuance justifies its denial. (*Id.* at pp. 41-42.) Moreover, there can be no good cause where counsel and the defendant have failed to prepare for trial with due

---

<sup>3</sup> Corral only complains of the trial court's failure to grant his first requested continuance. In any event, we conclude the trial court properly denied both defense motions to continue the trial for lack of good cause.

diligence. (*People v. Mickey* (1991) 54 Cal.3d 612, 660; *People v. Jenkins, supra*, 22 Cal.4th at p. 1037.)

The defense failed to establish good cause for the continuance by showing it would have been useful. Defense counsel never presented the basis for a *Pitchess* motion at the time he sought the continuance; he did not state what information he expected to be disclosed as a result of a *Pitchess* motion or how such evidence would be of help to the defense. (See, e.g., *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83-84.) Because there was no showing of materiality, what could be gained from a continuance was highly speculative. (See, e.g., *People v. Beeler, supra*, 9 Cal.4th 953, 1003-1004.) As a result, the trial court did not abuse its discretion, nor did the denial of the continuance violate Corral's constitutional rights. (*People v. Jenkins, supra*, 22 Cal.4th at pp. 1039-1040.)

## **2. Corral's request to discharge his retained counsel.**

### **a. Relevant procedural facts.**

When the closed hearing began, the court informed Corral that he was not automatically entitled to appointed counsel should he discharge his retained counsel. The court explained that Corral could discharge his retained counsel at any time if the judicial process were not disrupted. Corral told the court he was dissatisfied with his counsel's failure to file a *Pitchess* motion and did not want to proceed to trial "without it." Defense counsel agreed that Corral should not have to suffer for his failure to file the motion. The court denied Corral's request, concluding that it was untimely and intended as "a delaying tactic."

### **b. The trial court did not improperly deny his request to discharge retained counsel.**

Corral contends the trial court wrongly deprived him of his right to discharge retained counsel. Not so.

"The right to the effective assistance of counsel 'encompasses the right to retain counsel of one's own choosing.'" (*People v. Courts* (1985) 37 Cal.3d 784, 789.) Due

process of law comprises a right to appear and defend with retained counsel of one's own choice. (*Id.* at pp. 790-791.)

An indigent defendant is entitled to have the trial court discharge retained counsel and appoint new counsel upon his request with or without cause. (*People v. Ortiz* (1990) 51 Cal.3d 975, 982, 984.) “A nonindigent defendant’s right to discharge his retained counsel, however, is not absolute. The trial court, in its discretion, may deny such a motion if discharge will result in ‘significant prejudice’ to the defendant [citation], or if it is not timely, i.e., if it will result in ‘disruption of the orderly processes of justice’ [citations]. As the court stated in *Sampley v. Attorney General of North Carolina* (4th Cir. 1986) 786 F.2d 610, 613, the ‘fair opportunity’ to secure counsel of choice provided by the Sixth Amendment ‘is necessarily [limited by] the countervailing state interest against which the sixth amendment right provides explicit protection: the interest in proceeding with prosecutions on an orderly and expeditious basis, taking into account the practical difficulties of “assembling the witnesses, lawyers, and jurors at the same place at the same time.”’ The trial court, however, must exercise its discretion reasonably: ‘a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.’ [Citation.]” (*People v. Ortiz, supra*, 51 Cal.3d at pp. 983-984.) “Reversal is automatic . . . when a defendant has been deprived of his right to [discharge retained counsel and] defend with counsel of his choice.” (*Id.* at p. 988.)

A trial court has discretion to grant a continuance to a defendant to retain counsel. (*People v. Courts, supra*, 37 Cal.3d at p. 790.) “A continuance may be denied if the accused is ‘unjustifiably dilatory’ in obtaining counsel, or ‘if he arbitrarily chooses to substitute counsel at the time of trial.’ [Citation.]” (*Id.* at pp. 790-791.) In determining whether a trial court’s refusal to grant a defendant’s request for a continuance is “so arbitrary as to deny due process, this court ‘looks to the circumstances of each case, “particularly in the reasons presented to the trial judge at the time the request [was] denied.”’ [Citations.]’ [Citation.]” (*People v. Jeffers* (1987) 188 Cal.App.3d 840, 850,



quoting from *People v. Courts*, *supra*, at p. 791.) The defendant has the burden of demonstrating an abuse of discretion. (*People v. Jeffers*, *supra*, at p. 850.)

Corral argues that despite his day-of-trial request to discharge counsel, it was not made for dilatory purposes, but only based on defense counsel's failure to file a *Pitchess* motion. Additionally, he maintains the request would not have been an unreasonable disruption of the proceedings because there is no indication that the prosecution witnesses (two police officers), would later be unavailable to testify or that the prosecutor would object to a continuance for substitution of counsel, and the request was made before jury selection began.

Corral's argument would be persuasive but for defense counsel's failure to demonstrate the basis for, and the potential materiality of, the *Pitchess* motion. To the extent there was no showing how the discovery information sought figured into his defense, Corral's request to discharge his retained attorney to pursue a *Pitchess* motion with new counsel was an arbitrary decision. Thus, the trial court properly found the request was motivated by a desire to delay the trial, and such delay would have been unreasonable under the circumstances.

### **3. Corral's claim of Proposition 36 drug treatment eligibility.**

#### **a. Relevant procedural facts.**

At the sentencing hearing, defense counsel argued Corral qualified for drug treatment probation under Proposition 36, based on his current conviction for possession of a controlled substance (case No. TA064655). The trial court disagreed because it had already revoked probation on Corral's possession for sale conviction, making him ineligible for Proposition 36 drug treatment probation. Corral was sentenced to state prison for an aggregate term of five years.

#### **b. Corral has waived his equal protection argument on appeal.**

Corral argues the trial court violated his equal protection rights (U.S. Const., 14th Amend; Cal. Const., art. I, § 7) by denying him, as a probationer, the benefits of Proposition 36 afforded to "similarly situated parolees." Our review of the record

indicates that Corral did not raise this issue before the trial court. Accordingly, we treat the issue as waived and will not consider it further. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 362, [defendant could not make equal protection challenge for first time on appeal]; *People v. Pecci* (1999) 72 Cal.App.4th 1500 [by failing to raise point below, defendant waived argument that statute making him ineligible for probation violated his rights to due process and equal protection].)<sup>4</sup>

### **DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ZELON, J.

We concur:

JOHNSON, Acting P. J.

WOODS, J.

---

<sup>4</sup> For his equal protection challenge, Corral relies primarily on *People v. Guzman* (2003) 111 Cal.App.4th 57. On November 12, 2003, after this case was fully briefed, the California Supreme Court granted review of *People v. Guzman*, S119129.